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No. 83-295

In the Supreme Court of the United States

OCTOBER TERM, 1983

LYNDA LEBOEUF COSTA,
PETITIONER,

v.

JOHN A. MARKEY, ET ALS.,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I

QUESTION PRESENTED FOR REVIEW

Whether, pursuant to a Title VII action under disparate impact analysis, a female plaintiff who has been denied appointment by an employment requirement that classifies far more women than men as ineligible for an employment position which is open to both men and women is prevented from establishing a *prima facie* case of discrimination because in a particular round of the hiring process the applicant pool contained only women.

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John A. Markey, *et als.*, various officials of the City of New Bedford, file this Brief in Opposition to the Petition for a Writ of Certiorari of Lynda LeBoeuf Costa.

Opinions Below

The opinion of the District Court is reported: *LeBoeuf* v. *Ramsey*, 503 F. Supp. 747 (D. Mass. 1980) and is attached to the petition at p. 47a.

[1] This Brief is presented on behalf of those original defendants who are officials of the City of New Bedford, or their successors. The parties as originally named in the complaint have been accurately restated in the petition, although the last sentence of the "List of Parties" incorrectly asserts that the City of New Bedford is somehow represented there.

A Second group of Defendants, who are Massachusetts State officials, have elected to forego any submissions to this Court.

The opinion of the original appellate panel of the Court of Appeals is reported: *Costa* v. *Markey*, 677 F.2d 158 (1st Cir. 1982) and is attached to the petition at p. 28a. The citation given by the Petitioner is incorrect.

The opinion of the rehearing panel of the Court of Appeals is reported: *Costa* v. *Markey*, 706 F.2d 1 (1st Cir. 1983) and is attached to the petition at p. 11a. The citation given by the Petitioner is incorrect, having been withdrawn by the publisher.

The opinion of the Court of Appeals *en banc* is reported: *Costa* v. *Markey*, 706 F.2d 1, 10 (1st Cir. 1983), and is attached to the petition at p. 2a.

Jurisdiction

The latest judgment of the Court of Appeals was entered on May 23, 1983. Jurisdiction of this Court has been invoked under 28 U.S.C. §1254(1).

Statute Involved

The statute involved is §703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1976). The relevant portion has been reprinted in the petition.

Statement of the Case

In the spring of 1973, the Police Department of the City of New Bedford, Massachusetts (hereinafter "City"), began to experience a need for additional female police employees. Until this time, men and women held distinct positions within the police department. Women, who were known then as "policewomen," were not allowed to perform the general street duties that the male "police officers" were, but were instead assigned to special tasks that could most effectively be performed by

women: searching, interrogating and transporting female prisoners; counselling female juveniles; investigating sex offenses and child abuse cases; and attending domestic disturbances.

Since the civil service list of eligible candidates from the last policewoman exam had expired by operation of law, the City, in response to its need, requested in June, 1973, that a new policewoman exam be administered by the Massachusetts Division of Civil Service. When no such test was held, the City requested again. The City then inquired into the possibility of using a valid list of eligible "policewoman" candidates already certified to the nearby City of Taunton. Finally the City was informed by State Civil Service officials that, because of changing employment laws, no future "policewoman" exams would be held, but that the City would have to petition the Massachusetts Commission Against Discrimination for special permission to engage in gender-specific hiring. With such approval, the Civil Service Commission could release a list of female names to the City of New Bedford. The City promptly made such a request on March 29, 1974, which was granted on May 9, 1974.

In the meantime, the Plaintiff had taken the civil service "police officer" exam in October, 1972, however, all the events mentioned above took place before the results of that exam were made available to the City. The results had been delayed due to litigation against the State Division of Civil Service over minority and veteran preferences.

On July 30, 1974 an integrated list of male and female names was certified to the City by the Civil Service Commission. The City conducted interviews and hired a number of male candidates from this list, but no women were hired because they had all scored too low on the exam.

The Plaintiff, however, was mistakenly interviewed by the City. Through an error of the state Civil Service Commission, she was initially ranked high enough on the list to receive an

interview and was rejected because she failed to meet the City's five foot six inch height requirement. After it was discovered that the Plaintiff was not entitled to minority preference, however, the Commission directed that her name be placed lower on the list, to a position in which she would never have been reached for an interview. The District Court found that this calamity resulted in the Plaintiff being denied only an "invalid appointment" because of the operation of the height requirement. At any rate, after corrected placement, no men were hired whose names fell below the Plaintiff's.

During all this time, the City's need for female police officers was becoming urgent due to the retirement and disability of two female officers. At last, the Civil Service Commission certified a list of all female names to the City on August 12, 1974. This "select list" was not derived from the Taunton candidates, as originally planned, but was instead composed of female names extracted from the July 30, 1974 "integrated list" in the order of their respective adjusted scores on the October, 1972 police officer exam. The Plaintiff's name was first on this select list, but she was rejected due to her failure to meet the height requirement. Two other women, whose names ranked below the Plaintiff's, were hired from the all-woman list. Both of these women were taller than five feet six inches.

Plaintiff filed a charge of discrimination with the proper state and federal agencies and then commenced this action in the United States District Court for the District of Massachusetts. At her trial, Plaintiff introduced statistics which proved that over 80% of all women were shorter than five feet six inches while only 20% of men were shorter than that height. Although the relevance of these statistics was objected to, the trial judge found that they established a *prima facie* case of employment discrimination. As a result of the District Judge's finding, the parties entered into a comprehensive stipulation which encompassed all the relief ultimately

awarded by the Court. Notably, the City agreed to place the Plaintiff on the Police Department permanently, regardless of the outcome of the City's announced appeal, although if the City succeeded on appeal her seniority would be adjusted to the date of actual appointment. The trial judge expressly found, however, that the height requirement was not imposed with any discriminatory purpose. Judgment was entered for the Plaintiff and back pay, attorney fees, and reinstatement were ordered.

The City appealed to the Court of Appeals for the First Circuit which reversed the District Court in a unanimous opinion. The crux of this first appellate decision was the observation that it was factually impossible for the Plaintiff to establish a *prima facie* case of employment discrimination given the fact that she was in competition with only women. "The height [requirement] does its dirty work only when there are males...to prefer. Absent this role of disproportionate preferment, the factor no longer distinguishes between sexes...." *Costa* v. *Markey*. 677 F.2d 158, 160 (1st Cir. 1982).

Plaintiff, during the course of this first appeal, relied heavily on the Second Circuit's opinion in *Teal* v. *Connecticut*, 645 F.2d 133 (2d Cir. 1981), *aff'd*, 457 U.S. 440 (1982). The First Circuit had rejected the Plaintiff's application of *Teal*, however, because it was factually inapposite and because it invited scrutiny into every facet of a hiring process even where the end result revealed no evidence of discrimination. Shortly thereafter, this Court affirmed *Teal* and the Plaintiff petitioned the First Circuit for a rehearing, which was granted.

The rehearing panel, rendering its decision in three separate opinions, reversed itself and reinstated the District Court's judgment. The majority opinion stated, as the foundation for its reasoning:

> In this case the City applied the requirements to women only and hired only women. But this is no defense to a

> *prima facie* case of disparate impact discrimination. It seeks to justify the disparate effect of the rule in general by pointing to the end results of one particular application of the rule. This is the "bottom line" approach which is proscribed by *Teal*.

Costa v. *Markey*, 706 F.2d 1, 5 (1st Cir. 1982).

The City then petitioned the First Circuit for a rehearing *en banc* which was also granted. In ordering the *en banc* review, however, the court directed the parties to respond to the following issue:

> Should this Court view the relevant job here at issue (1) as a single job open only to women or (2) as one of a set of police force jobs in general open to both men and women? If the latter, are not men and women in competition for the same jobs?

The *en banc* Court then reversed itself again, reinstating the original appellate opinion which had reversed the District Court. The key to the *en banc* opinion was its meticulous sifting of the facts of the case. Once those facts were fully understo l by the court, it was clear that there existed two separate rounds of hiring. In round one, the integrated list, the Plaintiff was rejected because she scored too low on the exam. In round two, the all-female list, she was excluded because of her height. But since there were no men in the competition of round two, there could have been no discrimination based on sex. Without men in the applicant pool, the height requirement could only distinguish between *tall women* and *short women*.

While the *en banc* Court expressed its prediction that the height requirement would probably have violated Title VII in a different set of circumstances, the Court was "compelled to decide the case on the facts" before it. 706 F.2d 12. And upon

those facts the Court found it was clear that "competition between men and women was at least temporarily suspended so that the City could hire two needed female police officers. Without the height requirement, the City would still have hired only two women. The only difference is that Plaintiff would have been one of them." *Id.*

Reasons for Denying the Petition

I. On the Particular Facts of This Case, It Was Impossible for the Plaintiff To Establish a *Prima Facie* Case of Employment Discrimination.

Once the fact is understood that the City of New Bedford set out in 1973 to hire a woman police employee (whether she was to be known as a "policewoman" or a "female police officer"), the conclusion is inescapable that the Plaintiff could never have established a *prima facie* case. This is because of the two distinct rounds of hiring.

Plaintiff was listed 90th on the first ("integrated") civil service list. Although she was the top female, the last man hired from that list was ranked 56th. Thus in round one the Plaintiff was rejected because of her poor test score. For the City, there was no practical hope of hiring a woman from this list.

When the City resorted to the "select" list for the specific purpose of hiring a woman (by now they needed *two*), there were no men in the applicant pool. In effect, the Plaintiff was given a "second chance," but in this round she was now in competition only with other women.

The key to understanding why the Plaintiff could not establish a *prima facie* case lies not so much in formal legal precedent as in the fundamental dictionary definition of the word "discrimination": to make a choice between two or more options. Before one can discriminate, there must be at least two items from which to make a choice. This Court said in

Griggs v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), that "Discriminatory *preference* for any group, minority or majority, is precisely and only what Congress has proscribed." (emphasis added). Thus under *Griggs* before one can even reach the question of whether a particular selection device has a disparate impact on a protected group, it must be shown that there were two groups from which the device could prefer one over the other. In the present case then, with an all-female applicant pool, it was impossible to make a choice between males and females. And, since the height requirement could not possibly operate to prefer men over women, it cannot be said to have a "disparate impact" on women. The discrimination, or preferential choice, made here was based solely on *height* and not on any protected category (race, religion, sex, etc.).

Another way to show the factual impossibility of Plaintiff's *prima facie* case is to examine her statistics introduced at trial. Here again the foundation of this argument is to understand the fundamental object of statistics: to prove a meaningful comparison between two or more observations. Plaintiff showed that 80% of all women were shorter than 5 feet 6 inches and only 20% of men were thus. These statistics are meaningless because, with no men in the relevant applicant pool, any comparison with men proves nothing.

The purpose for which this Court has long condoned the use of statistics in Title VII cases is to discover whether an employer's hiring practices (or a selection device) operate to select one group disproportionately over another. See *Hazelwood School District* v. *United States*, 433 U.S. 299, 308 n. 13 and 14 (1977); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 340 n. 20 (1977). In other words, the rate at which members of one group would be selected at random is compared to the rate at which they are actually selected (or excluded). If the comparison shows a difference above 2 or 3 standard deviations, then disparate impact can be inferred.

Applying this principle to our case, then, even if 100% of all men were taller (*or shorter*) than 5 feet 6 inches, it would still have no effect on the chance of any woman in the applicant pool being selected or excluded. *They operate independently of each other: 80% of all women would still be ineligible.* Since the male height statistics have no effect on the female selection rate, they provide no meaningful comparison upon which a factfinder could have found that women were excluded in excess of the rate at which they would have been excluded at random. This is because the statistics for women were only meaningful to predict their selection rate *among themselves*. For example, if 100% of women were shorter than 5 feet 6 inches, none of them could be selected at random; and if 100% of women were taller than 5 feet 6 inches, all of them could be selected at random. The mens' height statistics have no effect on these mathematical realities. Only when men and women are placed in the same applicant pool together can these statistics predict the rate at which the height requirement will exclude women on the basis of their sex. Without men in the pool, the statistics can only predict the rate at which women are excluded on the basis of their height. Thus, Plaintiff's statistics were meaningless to show that the 5 foot 6 inch height requirement had a disparate impact upon women.[2]

[2] The case law in Title VII cases bears this fact out. In fact, in the paramount statistical proof of discrimination case, *Hazelwood School District* v. *United States*, 443 U.S. 299 (1977), the Court explained at length that the choice of the relevant comparative statistic would mean the difference of a finding of racial discrimination or not. 433 U.S. 311, n. 17. In fact, in *Hazelwood* it was not sufficient to simply compare black teachers hired with the ratio of black teachers available in the geographical area, it was necessary to better qualify that second statistic to define the precise geographical locality the school district could actually draw from.

The need to qualify the second comparative statistic cannot be understated. It has been the death knell to many cases attempting to prove a *prima facie* case of disparate impact by the use of statistics. *Coe* v. *Yellow Freight System*, 646 F.2d 407 (10th Cir. 1981) (Plaintiff failed to establish a *prima facie* case when he attempted to introduce two sets of inappropriate

II. This Court's Decision in *Teal* Does Not Change This Result.

The teaching of *Connecticut* v. *Teal*, 457 U.S. 440 (1982) is really not new. In 1971 the Court, in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam), held that a rule barring women with pre-school aged children from employment had a disparate impact upon women where men with pre-school aged children were not likewise rejected. This was so even though 75% to 80% of those ultimately hired were women. The reason given is that a greater percentage of women were foreclosed from the opportunity of employment than were men. The fact that women, as a class, were ultimately benefitted did not repair the damage done to those women who were initially denied the opportunity, and thus was no defense to their *prima facie* case.

Similarly, in *Teal* there was a selection device (a test) which preferentially selected whites. In the long run, however, blacks were ultimately promoted more favorably than whites. Again this Court said that the "bottom line" result does not cure the denial of opportunity to those blacks who failed.

The critical distinction between those cases and the case at bar is this: in *Phillips* and *Teal* there was a selection device that caused one group to be preferred over another on the basis

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statistics comparing irrelevant relationships). *See also DeMedina* v. *Reinhardt*, 686 F.2d 997 (D.C. Cir. 1982) (relevant applicant pool must be qualified by including only applicants with skills likely to apply); *Payne* v. *Travenol Labs*, 673 F.2d 798 (5th Cir. 1982) (relevant comparison was applicants with their own transportation); *Riveira* v. *City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982) (relevant comparison pool was those with requisite skills); *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982) (relevant applicant pool must reside within the geographical area found to be the actual source of applications); *Pope* v. *City of Hickory*, 29 FEP Cas. 399 (D. N.C. 1981), *aff'd* 679 F.2d 20 (4th Cir. 1982) (comparative pool not meaningful because of small size and uncertainty); *United States* v. *County of Fairfax*, 629 F.2d 932 (4th Cir. 1980) (geographical area must be qualified); *Wilmore* v. *City of Wilmington*, 533 F. Supp. 844 (D. Del. 1982) (comparative pool must be qualified with special employment skills).

of race or sex, *and then* some other factor was offered to repair the damage done by the disparate impact. In the instant case, however, there were not two protected groups between which a preference could be made. Men were not preferred over women; only tall women were preferred over short women. There were no women who were initially denied the employment opportunity *on the basis of their sex*. The fact that women were ultimately hired is not a factor subsequently offered to cure the effect of any disparate impact because there was none. The "bottom line" result here (that women were eventually hired) was a foregone conclusion given the fact that being female was a prerequisite to entering the applicant pool.[3] It was not something interposed later down the line in the hiring process to change the result.

The Petitioner incorrectly asserts that *Teal* governs here because there was a "subsequent decision by the City to hire two women" which was intended to "undo the discriminatory effect of the height requirement." Petition at 15. This is plainly against the facts in the record. The City had been actively attempting to hire a woman for over two years before the Plaintiff's name first appeared on a list.

The Petitioner attempts to argue that she (and 80% of all other women) were immediately foreclosed from the opportunity of being a police officer in New Bedford because of the height requirement, and thus the decision to hire a woman later was an attempt to repair the discriminatory damage done. This analysis begs the question, however. The Plaintiff, and other women, were initially excluded because they scored too low on the exam. Later, the Plaintiff and other women were excluded because they were *short*, and not because they were *female*.

Short men were likewise foreclosed from this employment opportunity. Only if the Plaintiff can demonstrate that the height requirement is determinative of *sex* can she make out a case under Title VII.

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[3] Although it is not a crucial issue in this case, it may fairly be said that being female was a bona fide occupational qualification. Viewing it thus further points out the factual impossibility of Plaintiff's *prima facie* case.

Conclusion

While the question presented in the petition has potentially far-reaching consequences, the peculiar facts of the case are not conducive to further review. As the Court of Appeals *en banc* noted, "we are compelled to decide this case on the facts before us." This result was achieved only after three separate hearings before the Court of Appeals. The final result is owed to the lower court's meticulous review of the record and thorough understanding of the facts. Such a set of circumstances is not likely to arise again, and thus makes further review of this case impractical for its limited precedential value. Furthermore, as the Court of Appeals noted, the Plaintiff is presently employed by the New Bedford Police Department, in keeping with its stipulation prior to the District Court judgment.

Respectfully submitted,

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